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No. 95-720

Supreme Court, U.S.
FILED
DEC 4 1995
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In The

Supreme Court of the United States

October Term, 1995

INTERNATIONAL ASSOCIATION OF ENTREPRENEURS OF AMERICA BENEFIT TRUST,

Petitioner,

v.

JAY ANGOFF, DIRECTOR, MISSOURI DEPARTMENT OF INSURANCE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JEANINE D. HAZELTON
Attorney of Record
Department of Insurance
State of Missouri
P.O. Box 690
Jefferson City, MO 65102
(314) 751-2619

Attorney for Respondent Jay Angoff, Director, Missouri Department of Insurance

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Did the District Court abuse its discretion by requiring IAEA to establish its status as an ERISA plan as a predicate to maintaining an action for declaratory judgment under 28 U.S.C. § 2201?

2. Do state and federal courts have concurrent jurisdiction to decide ERISA preemption issues raised as an affirmative defense in state court?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iii

RESTATEMENT OF THE CASE..... 1

REASONS TO DENY THE WRIT..... 2

The Decision of the Eighth Circuit Does Not Conflict With Decisions of This Court or Congressional Intent that Federal Courts Have Exclusive Federal Jurisdiction Over ERISA Fiduciaries' Claims Under § 502 Because This Action Was Not Brought Under § 502 of ERISA..... 2

There Is No Conflict in the Courts of Appeal or Other Federal Courts Over Application of *Younger* Abstention to ERISA Cases Invoking Exclusive Federal Jurisdiction to Present a Claim That ERISA Preempts a Pending State Action..... 4

The Eighth Circuit's Holding That State Courts Have Concurrent Jurisdiction to Determine ERISA Status Where the Issue May Be Raised As Part of an Affirmative Defense Did Not Delegate Determination of Federal Subject Matter Jurisdiction to the State Court and Does Not Conflict With Decisions of This Court..... 8

CONCLUSION..... 9

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1943) 7

CSXT, Inc. v. Pitz, 883 F.2d 468 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030, 110 S.Ct. 1480 (1990) 8, 9

Employers Resource Management Co., Inc. v. Shannon, 65 F.3d 1126 (4th Cir. 1995) 4, 5

Federal Express Corp. v. Tenn. Pub. Serv. Comm'n, 925 F.2d 962 (6th Cir. 1991), *cert. denied*, 502 U.S. 812, 112 S.Ct. 59 (1991) 8

Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353 (9th Cir. 1986) 4

Fuller v. Bartlett, 894 F. Supp. 874 (D.Md. 1995) 4

Fuller v. Ulland, 858 F. Supp. 931 (D. Minn. 1994) 4

General Motors Corporation v. Buha, 623 F.2d 455 (6th Cir. 1980) 6, 7

General Motors v. California Board of Equalization, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988) 6, 7

Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986) 7

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S.Ct. 2870 (1981) 9

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980) 7

Livolsi v. Ram Const. Co., 728 F.2d 600 (3rd Cir. 1984) 7

Younger v. Harris, 401 U.S. 36, 91 S.Ct. 746 (1971) 3, 4, 5, 6, 7

TABLE OF AUTHORITIES – Continued

Page(s)

FEDERAL STATUTES

28 U.S.C. § 1331 2

28 U.S.C. §§ 1441, et seq. 2

28 U.S.C. § 2201 ..... i, 2, 3

28 U.S.C. § 2283 5

29 U.S.C. § 1001, et seq. 2

29 U.S.C. § 1132 (§ 502) ..... ii, 2, 3, 4

29 U.S.C. § 1132(a)(1)(B) 5

29 U.S.C. § 1132(e) 8

29 U.S.C. § 1132(e)(1) 7

FEDERAL RULES

Federal Rule of Civil Procedure 57 ..... 2, 3

STATE CASES

Angoff v. Kenemore, et al., 887 S.W. 2d 782 (Mo. App. 1994) 5, 6

Blue Cross Hospital Serv., Inc. of Missouri, et al. v. Frappier, 681 S.W. 2d 925 (Mo. 1984), vacated, 472 U.S. 1014, and readopted on remand, 698 S.W. 2d 326 (Mo. 1985) 5, 6

STATE STATUTES

Mo. Rev. Stat. § 375.786 (1986) 6

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Jay Angoff, Director of the Department of Insurance of the State of Missouri, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Eighth Circuit's opinion. That opinion is reported at 58 F.3d 1266 (8th Cir. 1995) and is reprinted in the Petition for Writ of Certiorari at Appendix A.

RESTATEMENT OF THE CASE

Petitioner's statement of the case posits as fact a proposition for which there is no factual basis in the record below and omits a key procedural fact from the record below.

There is no basis in the record below for Petitioner's statement that "[t]he founding employer members of the Association established an ERISA-regulated" employee welfare plan. There is no basis in the record because Petitioner did not include this allegation in the Petition for Declaratory Judgment. Further, because it granted the Director's motion to dismiss on procedural grounds, the district court did not address the substantive issue of whether IAEA operates an employee welfare benefit plan within the meaning of ERISA.

Petitioner has omitted a fact relied upon by the Eighth Circuit, namely that Petitioner filed its declaratory judgment action only after it had attempted to remove the Director's state court action and the removal petition

had been denied as untimely. This fact supports the District Court's exercise of its discretion to prevent IAEA from circumventing the state court proceeding and the removal statutes, 28 U.S.C. §§ 1441, et seq.

REASONS TO DENY THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR CONGRESSIONAL INTENT THAT FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER ERISA FIDUCIARIES' CLAIMS UNDER § 502 BECAUSE THIS ACTION WAS NOT BROUGHT UNDER § 502 OF ERISA.

In its attempt to obtain review by this Court, Petitioner mischaracterizes the issue presented by the Eighth Circuit's decision that state and federal courts have concurrent jurisdiction over the type of claim brought by Petitioner. Petitioner would have this Court believe that this case was brought under § 502 of ERISA, 29 U.S.C. § 1132, when in fact the case was brought only under 28 U.S.C. § 2201, the Declaratory Judgment Act. This is not a § 502 case because Petitioner did not invoke § 502 in its Petition for Declaratory Judgment. Petitioner did not plead § 502 in its petition, nor did the petition seek injunctive relief available under § 502. Under the heading, "Jurisdiction and Venue," the petition stated, "This action arises under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Section 1001 et seq. ("ERISA"), and constitutes a Federal question so as to confer jurisdiction on this Court pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 2201 and Rule 57 of

the Federal Rules of Civil Procedure." (Petition for Declaratory Judgment ¶ 5, at App. 28.) In the prayer for relief, Petitioner sought an order "declaring IAEA/BT and the Plan to be an Employee Welfare Benefit Plan operating under ERISA and exempt from any licensing requirements for insurance companies in Missouri, for their costs expended herein, and for such further relief as the Court may deem just and proper." (Petition for Declaratory Judgment, at App. 31.) Thus the petition invoked the provisions of ERISA in order to establish federal question jurisdiction and not in order to obtain an injunction or other equitable relief under the civil enforcement provisions of § 502.

The Eighth Circuit treated the case as one brought under the Declaratory Judgment Act rather than under § 502 of ERISA, see App. 1-App. 2, because the Petition for Declaratory Judgment did not invoke § 502. This is why the court did not directly address the issue of abstention under *Younger v. Harris*, 401 U.S. 36, 91 S.Ct. 746 (1971) that Petitioner attempts to place before this Court.

The Court should deny the Petition for Writ of Certiorari because there is no conflict with this Court's decisions or Congressional intent with regard to the civil enforcement provisions of § 502 because this case was brought under the Declaratory Judgment Act, 28 U.S.C. § 2201 and not under § 502 of ERISA.

II. THERE IS NO CONFLICT IN THE COURTS OF APPEAL OR OTHER FEDERAL COURTS OVER APPLICATION OF *YOUNGER* ABSTENTION TO ERISA CASES INVOKING EXCLUSIVE FEDERAL JURISDICTION TO PRESENT A CLAIM THAT ERISA PREEMPTS A PENDING STATE ACTION.

Even if Petitioner had pleaded § 502 in the Petition for Declaratory Judgment, *Younger v. Harris*, 401 U.S. 36, 91 S.Ct. 746 (1971) would have required dismissal. Every court that has examined the issue of *Younger* abstention in depth in cases where the federal plaintiff seeks to circumvent a pending state court action by asserting what is essentially a defense of ERISA preemption has determined that *Younger* abstention is appropriate. *Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353 (9th Cir. 1986) and *Fuller v. Ulland*, 858 F. Supp. 931 (D. Minn. 1994) (*appeal pending*) are firmly grounded in the *Younger* abstention doctrine and may not be characterized merely as attempts by the federal courts to avoid resolving ERISA claims brought under § 502. The recent decision by the United States Court of Appeals for the Fourth Circuit, *Employers Resource Management Co., Inc. v. Shannon*, 65 F.3d 1126 (4th Cir. 1995), underscores the appropriateness of *Younger* abstention in such cases. There the federal court thoroughly analyzed the grounds for *Younger* abstention in an ERISA context and determined that *Younger* abstention applies where the claim can be raised as an affirmative defense in the pending state action. *Fuller v. Bartlett*, 894 F. Supp. 874 (D.Md. 1995) (*appeal pending*) is another case where a federal court applied *Younger* abstention to an ERISA fiduciary's claims after an in-depth examination of the issues.

In *Employers Resource Management*, supra, Employers Resource Management, Inc. (ERM), a staff leasing company which maintained employee benefit plans, filed suit in federal court seeking injunctive and declaratory relief under ERISA's civil enforcement provisions from an administrative proceeding instituted by the Virginia Insurance Commissioner to prevent the company from operating a multiple employer welfare arrangement (MEWA) without a state insurance license. 65 F.3d at 1129. The United States Court of Appeals for the Fourth Circuit upheld the District Court's dismissal under *Younger* and under the Anti-Injunction Act, 28 U.S.C. § 2283. 65 F.3d at 1134, 1136. Crucial to the Court's determination that *Younger* abstention required dismissal was its finding that the company could raise its ERISA preemption defense in the state administrative proceeding. 65 F.3d at 1136. The Court held, "ERM has not provided us with any reason to believe that the Commission is either incapable of reviewing ERM's claim of preemption under ERISA or that the Commission is somehow less trustworthy than its federal counterpart. We refuse to create an exception to *Younger* abstention based on ERM's mere assertion of an ERISA preemption challenge." *Id.*

Petitioner erroneously asserts that the state court cases on which the Eighth Circuit relied concerned only claims by ERISA participants or beneficiaries under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (Petition for Writ of Certiorari at 8). Neither *Angoff v. Kenemore, et al.*, 887 S.W. 2d 782 (Mo. App. 1994) nor *Blue Cross Hosp. Serv., Inc. of Missouri, et al. v. Frappier*, 681 S.W. 2d 925 (Mo. 1984), vacated, 472 U.S. 1014, and readopted on remand, 698 S.W. 2d 326 (Mo. 1985) involved claims by ERISA

participants or beneficiaries. In *Angoff v. Kenemore*, supra, the Missouri Director of Insurance brought an action under Mo. Rev. Stat. § 375.786, the same state statute involved in the underlying state court proceeding herein, to enjoin operation of a MEWA. 887 S.W. 2d at 783-84, 788. The MEWA operators raised a defense of ERISA preemption, and the Missouri Court of Appeals held that because the MEWA's benefit plan was not an employee welfare benefit plan within the meaning of ERISA, ERISA did not preempt the Director from regulating the plan. 887 S.W. 2d at 787-88. In *Blue Cross Hosp. Serv., Inc.*, supra, health services corporations sought a declaration that certain Missouri "mandated provider" statutes were preempted by ERISA. 698 S.W. 2d at 326-27. The Missouri Supreme Court held that the challenged statutes were laws regulating insurance and were therefore not preempted. 698 S.W. 2d at 327. Both *Angoff v. Kenemore* and *Blue Cross Hosp. Serv.* demonstrate the ability of state courts to decide ERISA preemption issues.

The cases finding *Younger* abstention appropriate do not conflict with the decisions cited by Petitioner because those decisions do not support the proposition that state courts lack jurisdiction to decide an affirmative defense of ERISA preemption. *General Motors Corporation v. Buha*, 623 F.2d 455 (6th Cir. 1980) is not on point because the federal plaintiff, General Motors, was not a party to the state court proceedings brought by Buha and could not have instituted its action in state court. See 622 F.2d at 459.

General Motors v. California Board of Equalization, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988), is likewise not on point because General Motors, the

federal plaintiff, was not a party to the state proceeding, and filed its federal action only after it learned of the state court decision. 815 F.2d at 1307. As in *Buha*, the federal plaintiff had no opportunity to have its federal claims considered by the state court.

Livolsi v. Ram Const. Co., 728 F.2d 600 (3rd Cir. 1984) is not on point because it did not involve *Younger* abstention and there was no parallel state court proceeding. *See* 728 F.2d at 601.

Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), involved abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943) rather than *Younger* abstention, and is therefore not on point. *See* 765 F.2d at 329.

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980), is also distinguishable from the instant case. There, the federal plaintiff, a plan beneficiary, alleged that the actions of New York's Superintendent of Insurance, as statutory liquidator of an insurance company, violated the terms of an employee welfare benefit plan and amounted to breach of fiduciary duty under ERISA. 635 F.2d at 962. The United States Court of Appeals for the Second Circuit held that the district court should have abstained from deciding Levy's "breach of plan" claim because the state court had concurrent jurisdiction, but that abstention was not warranted on the "breach of fiduciary duty" claim because it could be heard only in federal court under 29 U.S.C. § 1132(e)(1). 635 F.2d at 967. *Levy* is distinguishable from the line of cases supporting application of *Younger* abstention to cases involving claims of ERISA preemption because plaintiff Levy's breach of fiduciary duty claim

was in the nature of a purely offensive cause of action under ERISA. Such a claim clearly could not be raised in state court due to the grant of exclusive federal jurisdiction in § 502(e). In contrast, federal plaintiffs whose ERISA claims are in the nature of an affirmative defense of preemption have full opportunity to raise those claims in a pending state court action.

III. THE EIGHTH CIRCUIT'S HOLDING THAT STATE COURTS HAVE CONCURRENT JURISDICTION TO DETERMINE ERISA STATUS WHERE THE ISSUE MAY BE RAISED AS PART OF AN AFFIRMATIVE DEFENSE DID NOT DELEGATE DETERMINATION OF FEDERAL SUBJECT MATTER JURISDICTION TO THE STATE COURT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner's final point again confuses the issue of jurisdiction to declare whether its plan is an ERISA plan, which is not reserved exclusively to the federal courts, with exclusive federal jurisdiction to grant certain types of relief to ERISA plan fiduciaries. The Eighth Circuit did not delegate determination of federal subject matter jurisdiction as Petitioner alleges. Rather, it applied the accepted legal principle that state courts have the power to decide federal questions unless prohibited by Congress. See Decision of the Eighth Circuit at App. 4, citing *Federal Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 968 (6th Cir. 1991), *cert. denied*, 502 U.S. 812, 112 S.Ct. 59 (1991) and *CSXT, Inc. v. Pitz*, 883 F.2d 468, 472 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030, 110 S.Ct. 1480 (1990). The holding in *CSXT*, supra, was based on the rule as

declared by this Court that " 'State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute.' " 883 F.2d at 472, citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-79, 101 S.Ct. 2870, 2875-76 (1981). Petitioner's citation of decisions of this Court concerning the power and obligation of the federal courts to decide questions of subject matter jurisdiction (Petition for Writ of Certiorari, pp. 12-13) does not demonstrate that the Eighth Circuit's holding regarding concurrent jurisdiction of federal questions conflicts with the general principle that federal courts have jurisdiction to determine their own jurisdiction. None of the cases Petitioner cites even remotely address the issue of concurrent federal and state jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should deny the Writ of Certiorari.

Respectfully submitted,

JEANINE D. HAZELTON
Attorney of Record
Department of Insurance
State of Missouri
P. O. Box 690
Jefferson City, MO 65102
(314)751-2619

Attorney for Respondent
Jay Angoff, Director, Missouri
Department of Insurance